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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

JOHN F. CHEVALIER et al.,

Plaintiffs and Appellants,

v.

OCWEN FEDERAL BANK et al.,

Defendants and Respondents.

C045095

(Super. Ct. No. 127059)

In this action for breach of contract, breach of the covenant of good faith and fair dealing, and for an accounting, plaintiffs John F. Chevalier and Glenn A. Nash appeal from a judgment dismissing their *fourth* amended complaint without leave to amend, following the sustaining of a demurrer by defendants Ocwen Federal Bank, F.S.B. (Ocwen) and New Century Mortgage Corporation (New Century). Plaintiffs challenge only the denial of leave to amend. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On February 11, 2002, plaintiffs filed a complaint captioned: "Verified Complaint for Wrongful Foreclosure (California Civil Code § 2924[, subd.] (c)(a)(1)), Breach of

Contract, Negligence, Fraud, Intentional Infliction of Emotional Distress, Slander of Title, Abusive [sic] Process, Unfair and Deceptive Acts and Practices, Temporary Restraining Order and Permanent Injunction."

The complaint alleged as follows:

On August 31, 1999 (which an amended complaint changed to August 17, 1999), plaintiffs executed a deed of trust in favor of New Century in the amount of \$317,500, to be secured by property located at 5427 Clark Road in Paradise, which plaintiffs operated as a Bed and Breakfast Inn. On July 12, 2001, nonparty Professional Lenders Alliance, LLC (PLA), recorded a document naming itself as substitute trustee (on New Century's behalf) and filed a notice of default on the deed of trust, even though plaintiffs were not in default.¹ On August 1, 2001, the deed of trust was transferred to Ocwen. On October 16, 2001, PLA, acting on behalf of Ocwen, filed a notice of trustee's sale to sell the property at auction to the highest bidder, and subsequently published notice, causing plaintiffs to lose business. Plaintiffs alleged defendants knew or should have known that plaintiffs have, at all times, been current or paid in advance on payments due under the deed of trust.

¹ PLA was named as a defendant in the original complaint but, as later stated by the court, was dismissed by operation of law when plaintiffs omitted that defendant in subsequent amended complaints.

The original complaint appended as an exhibit a copy of the public notice of the trustee's sale.

Defendants demurred to the original complaint, on the grounds that (1) defendants' communications and performance of statutory procedures were privileged; (2) all tort claims failed because plaintiffs were limited to contractual damages; (3) the action for wrongful foreclosure failed because plaintiffs failed to allege that a foreclosure sale occurred; (4) plaintiffs' fraud count failed to plead the requisite element of justifiable reliance; and (5) defendants' alleged acts could not constitute abuse of process.

On May 20, 2002, the trial court sustained the demurrer with leave to amend.

On June 4, 2002, plaintiffs filed a "First Amended Complaint for Breach of Contract, Accounting, Negligence, Wrongful Foreclosure, Fraud, Negligence, Infliction of Emotional Distress, Abuse of Process and Unfair Competition." Despite the caption, there were no counts labeled accounting or wrongful foreclosure. The pleading repeated the factual allegations of the original complaint and added the following allegations:

On July 31, 2001, plaintiffs paid New Century \$17,257.70, which was more than enough to cure the claimed default and pay the September 2001 payment. At all times after July 31, 2001, plaintiffs have not only been current on their payments but have paid in excess of \$6,600 beyond the amount claimed in payments, late fees, and other fees. On multiple occasions, plaintiffs

have been required to provide proof of property insurance, and on at least two occasions defendants "force placed" insurance on plaintiff's property, charging unwarranted costs and fees and late fees resulting in further alleged deficiencies and defaults. On November 8, 2001, after plaintiffs provided proof of payments, Ocwen acknowledged slack handling of the matter and began depositing plaintiffs' payments into a forbearance account set up without plaintiffs' consent. Between March 6, 2002, and May 1, 2002, defendants refused to provide plaintiffs with a payoff amount for the loan, knowing plaintiffs had arranged new financing and knowing the failure to provide a payoff amount endangered the financing and cost plaintiffs additional interest payments. Since February 2002, defendants have refused to accept plaintiffs' monthly payments, returning the checks uncashed and demanding additional amounts for unnecessary force-placed insurance and fees, despite plaintiffs' proof of insurance. Defendants were engaged in a scheme to harass plaintiffs and obtain a windfall gain.

Defendants demurred, repeating the grounds asserted in the original demurrer, and adding that the complaint was uncertain and failed to plead requisite elements of breach of contract, negligence, and unfair competition, and that the pleading was uncertain due to "mis-captioning and wholesale re-incorporation of preceding causes of action into those following." Among other matters, defendants argued the contract claim alleged an August 31, 1999, deed of trust and a refinancing but failed to

set out the terms of any purported contract. Defendants noted plaintiffs also failed to plead with specificity their performance or defendants' breach of a contract.

On August 5, 2002, the trial court sustained the demurrer with leave to amend.

On August 22, 2002, plaintiffs filed a "Second Amended Complaint for Wrongful Foreclosure, Accounting, Breach of Covenant [of] Good Faith and Fair Dealing, Intentional Infliction of Emotional Distress, Unfair Competition." The pleading repeated earlier allegations and added the following allegations:

On July 16, 2001, plaintiffs paid \$6,600 by cashier's check to New Century, which failed to apply it to plaintiffs' account and failed to honor plaintiffs' demand for an accounting. Since New Century's assignment of the account to Ocwen, plaintiffs have been charged more than \$5,000 in late fees and costs. New Century assigned the deed of trust to Ocwen on August 1, 2001, and plaintiffs were never credited for the \$17,257.70 payment they made on July 31, 2001. Instead, defendants have charged late fees, legal fees, and arrearages on that amount. Plaintiffs have paid in excess of \$6,000 more than the amount due to date on the loan. Defendants have refused to make an accounting of plaintiffs' payments. In the July 11, 2001, notice of default and election to sell under deed of trust, defendants listed the amount due under the deed of trust as

\$12,323.59. Defendants knew or should have known this amount was incorrect.

The second amended complaint attached as exhibits the note, a corporation assignment of deed of trust, and notice of default and election to sell under deed of trust.

Defendants demurred to the second amended complaint, repeating the grounds asserted in the previous demurrer. The demurrer noted the pleading purported to attach a deed of trust but attached only a note. Defendants added that plaintiffs failed to plead grounds for an accounting.

In opposition to the demurrer, plaintiffs asserted among other things that the terms of the contract were adequately pleaded in the body of the complaint.

On January 21, 2003, the trial court sustained the demurrer to the second amended complaint, *without* leave to amend as to counts arising from the foreclosure (on grounds of privilege), but *with* leave to amend as to all other counts.

On January 30, 2003, plaintiffs filed their "Third Amended Complaint for Breach of Contract, Accounting, Breach of Covenant [of] Good Faith and Fair Dealing, Intentional Infliction of Emotional Distress, Unfair Competition, Negligence."

Defendants demurred, noting that once again the complaint alleged that the deed of trust was attached as an exhibit, but the exhibit included only a note and a corporation assignment of deed of trust, in which New Century purported to assign to an unnamed party all beneficial interest in a deed of trust. The

demurrer also repeated many of the points raised in previous demurrers.

In opposition, plaintiff argued among other things that the terms of the contract were adequately expressed in the note and corporation assignment of deed of trust.

Defendants replied the complaint alleged the contract that was breached was the deed of trust, not the note.

The trial court sustained the demurrer with leave to amend, warning plaintiffs this would be their last chance.

On April 14, 2003, plaintiffs filed their "Fourth Amended Complaint for Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Accounting." They attached a deed of trust, as well as the documents previously attached as exhibits.

Defendants demurred, noting among other things that the deed of trust identified "Pending Broker" as the beneficiary and nowhere mentioned any named defendant, and not one of the exhibits obligated the named defendants to do anything. The corporation assignment purported to reflect that New Century assigned a deed of trust to an unnamed party.² Moreover, the corporation assignment was dated September 7, 1999, whereas the complaint alleged New Century assigned a deed of trust to Ocwen on or about August 1, 2001.

² Defendants argued the assignment did not attach a legal description, but plaintiffs' opposition to the demurrer noted the same parcel number was listed on the deed of trust and the assignment.

The demurrer also noted that on the first page of the note, the identity of the lender was typewritten as "Pending Broker," and then lined out and the words "WJ Capital Corporation" were typed in. The demurrer further observed the bottom of the note pages reflected it was a three-page document, but plaintiffs had attached a fourth page that made no reference to the note and that bore what appeared to be two undated endorsements (to "Pay to the order of"), the first by WJ Capital Corporation to New Century, and the second by New Century to an unnamed party. The demurrer noted the complaint contained no allegations about WJ Capital, no attempt to explain the endorsements, no exhibits indicating an assignment of the deed of trust from "Pending Broker" to New Century, and no assignment from New Century to Ocwen.

Plaintiffs filed an opposition to the demurrer, arguing among other things that it was not necessary to allege evidentiary facts, and the deed of trust and note were attached as exhibits to show the terms of the contract "but are not evidence nor do they need to be evidence of the identities of the parties"

At the hearing on the demurrer, defense counsel appeared telephonically, and there was no appearance for plaintiffs. The trial court sustained the demurrer without leave to amend. A judgment of dismissal was entered, and plaintiffs appealed.

DISCUSSION

On appeal, plaintiffs do not develop an argument that the demurrer was wrongly sustained, but merely contend leave to amend should have been granted. In the introduction to their appellate brief, plaintiffs purport to contend that the order sustaining the demurrer "was either in error, or, if not, should have issued with leave to amend." However, the "ARGUMENT" section of plaintiffs' brief contains only two headings:

(1) "*Appellants Should be Allowed to Amend Their Cause of Action for Accounting;*" and (2) "*Appellants Should be Allowed to Amend Their Entire Complaint, Since They Show Here (Using Respondents' own Logic) How All of the Defects in the Pleading Can be Remedied.*" California Rules of Court, rule 14(a),³ requires that each brief "state each point under a separate heading or subheading summarizing the point" A reviewing court may disregard claims perfunctorily asserted without clear indication they are intended to be discrete contentions. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1346; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

Thus, the only argument we entertain in this appeal is plaintiffs' contention that leave to amend was wrongly denied.

"When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such

³ Undesignated rule references are to the California Rules of Court.

court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.” (Code Civ. Proc., § 472c, subd. (a).)

Plaintiffs rely on the following principle:

“If the [trial] court sustained the demurrer without leave to amend . . . , we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]”

(*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Defendants respond this general principle does not compel reversal where, as here, the trial court has already given the plaintiffs multiple opportunities to amend. (E.g., *Consolidated Con. Co. v. McConnell* (1919) 40 Cal.App. 443, 446 [“there is a limit to which the patience of the trial court may be extended in the matter of allowing repeated attempts to amend a faulty pleading”].)

Plaintiffs argue they “never had a chance to remedy any of the uncertainties regarding the attachment of the deed of trust to the complaint, since the very first time it was attached to a complaint was with the filing of the FAC [fourth amended complaint].”

We reject plaintiffs' attempt to portray themselves as passive victims of their own shoddy pleading. The deed of trust could have been attached to an earlier complaint, in which case plaintiffs would have had a "chance" to remedy uncertainties regarding it. Plaintiffs claim the deed of trust "was only attached to the complaint to comply with [defendants'] demurrer to the Third Amended Complaint." However, defendants made the same point (i.e., that the complaint failed to set forth the terms of the contract either by attaching a copy or by alleging the substance of the contract) in their demurrers to the *first* amended complaint and the *second* amended complaint. Additionally, the demurrer to the *second* amended complaint pointed out that the deed of trust, to which the complaint referred as an attachment, was not in fact attached to the complaint. The demurrer to the *third* amended complaint *again* pointed out that the deed of trust, to which the complaint referred as an attachment, was not in fact attached to the complaint.

Plaintiffs claim defendants made no objection about the assignment of the deed of trust until the demurrer to the fourth amended complaint, even though the assignment was attached to the third amended complaint. Plaintiffs argue it is unfair to treat them as if they had repeatedly failed to cure defects, when the demurrers were "moving targets in terms of the ambiguities and uncertainties they decried."

Plaintiffs' position is not persuasive. We have seen that plaintiffs repeatedly failed to cure defects raised in the demurrers. Moreover, we observe that plaintiffs do not develop any argument or cite any authority that defendants forfeited any grounds for demurrer by failing to raise them earlier.

In any event, plaintiffs fail to show how they could amend the complaint to cure its defects.

Regarding amendment, plaintiffs first argue they should be allowed to amend their claim for an accounting. They assert a complaint adequately presents a claim for accounting where it alleges (1) a relationship between the parties or other circumstances showing that legal remedies are inadequate, and (2) an unknown balance is due that cannot be ascertained without an accounting, the means of which are within the knowledge of the defendant. Plaintiffs assert an accounting is appropriate even when the defendant is not a fiduciary of the plaintiff, if the accounts are so complicated that an ordinary legal action for a fixed sum is impracticable, and the defendant committed misconduct. Plaintiffs assert their pleading adequately alleged misconduct (in the form of failure to credit payments and improper and/or unnecessary loan charges) and that money is owed. We do not read this assertion as an argument that the demurrer was improperly sustained, because the assertion appears under the heading that "*Appellants Should be Allowed to Amend their Cause of Action for Accounting.*" (Rule 14(a); *People v.*

Turner, supra, 8 Cal.4th 137, 214, fn. 19 [contentions not adequately briefed may be disregarded].)

Moreover, plaintiffs acknowledge the demurrer to the accounting claim was based in part on the uncertainties in the contractual allegations and attachments.

Plaintiffs argue they can cure any defect in the accounting claim because the defect stemmed from the reference to the attached deed of trust and the ambiguities between the attachment and complaint's allegations, i.e., that the problems were entirely due to anomalies of how the facts were presented, not with the underlying right to assert the theories asserted. Plaintiffs state on appeal that they "can provide resolutions to those ambiguities and anomalies - indeed, as [defendants] noted in the demurrer to the FAC [fourth amended complaint], '. . . (p)resumably any assignment of the Deed of Trust are [sic] recorded and a matter of public record . . . plaintiffs' counsel has not bothered to obtain such documents, to attach them as exhibits, or even to explain the exhibits he does attach' [Citation to record.] This is a very good statement of exactly the appropriate process that [plaintiffs] can and will follow if allowed to amend the complaint, which should result in a reversal of the judgment appealed hereby."

This tells us nothing about what amendments plaintiffs would make. Plaintiffs have failed to meet their burden of proving that an amendment would cure the pleading defects.

(*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th 1074, 1081.)

Plaintiffs' also argue regarding amendment as follows:
"Appellants Should be Allowed to Amend Their Entire Complaint, Since They Show Here (Using Respondents' own Logic) How All of the Defects in the Pleading can be Remedied." Plaintiffs do not dispute that there were discrepancies between the averments and the attachments to the fourth amended complaint. Plaintiffs argue that, since all counts of the complaint were defective because of ambiguities in the loan documents with respect to the complaint's allegations, plaintiffs "can resolve them by fairly simple amendments to the FAC [fourth amended complaint], since there is no longer a need (as there [w]as between the Third Amended Complaint and the FAC) to add new attachments to satisfy the requests of [defendants]. So, for all causes of action, a restatement of the facts that will tie together the seeming anomalies and ambiguities between the attachments and the factual allegations will remedy the basis for uncertainty claimed in the demurrer to the FAC."

Plaintiffs' reply brief states they "can provide resolutions to uncertainties by locating and pleading any assignment[s] of the Deed of Trust that are recorded and a matter of public record, or by simply explaining/averring how the deed of trust came to be assigned to [defendants]."

However, plaintiffs have had ample opportunity to check the public records. Their appellate briefs tell us nothing about what amendments plaintiffs would make.

We conclude plaintiffs have failed to meet their burden of showing amendments that would cure defects in their pleading. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th 1074, 1081.)

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a).)

SIMS, Acting P.J.

We concur:

MORRISON, J.

BUTZ, J.